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Don't Think Twice – Can Administrative Decision Makers Change Their Mind?

Can administrative decision makers vary or revoke a decision they have made?[1] This is a question of some significance to many administrators. It is a question that has traditionally received little judicial or academic attention, but has recently been the subject of a High Court decision, in *Minister for Immigration and Multicultural Affairs v Bhardwaj*,[2] a number of Federal Court decisions,[3] and a range of broader discussion.[4] As many of these cases and articles recognise, it is a question which appears to have a practical focus, but in fact leads to some of the most basic issues in public law.

Decision makers may wish to vary or revoke a decision for a range of reasons, and in a range of circumstances. This Briefing looks at the following questions, which a Commonwealth decision maker needs to ask in order to decide whether they can vary or revoke their decision.

- Has a decision been made?
- Can the decision be treated as invalid, and made again? This is the issue which was recently considered by the High Court in *Bhardwaj*.
- Is there an express statutory power to vary or revoke, and if so how can that power be exercised ?
- Is there a general power in ss.33(1) and 33(3) of the *Acts Interpretation Act 1901* (Cth) to vary or revoke?
- Is there an implied power to vary or revoke?

General Approach

Before considering these issues, it is necessary to note one important point. Whether an administrative decision maker can vary or revoke their decision is sometimes described as determining whether the decision maker is *functus officio* (that is, has discharged their duty). However there is no current general principle or presumption that once an administrative decision maker has made their decision they are *functus officio* in this sense. Rather it is necessary in each case to interpret the extent of the statutory power conferred on the decision maker, and determine whether this includes a power to vary or revoke.

Gleeson CJ in *Bhardwaj* formulated the basic legal issue in a broad manner, which focused on statutory power:[5]

> The question is whether the statute pursuant to which the decision-maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen.

This statement confirms the weight of Federal Court thinking, in a range of contexts.[6] It is consistent with the presumptions in ss.33(1) and 33(3) of the Acts Interpretation Act.

Has a Decision Been Made?

When a decision is provisional, or better characterised as conduct leading to a decision, it has not yet been perfected. In such a case, it is still open to the decision maker to reconsider the issue, whether or not a power to revoke or vary an actual decision exists.[7] This is because in such circumstances the decision is unperfected and not yet operational.

What is required to perfect a decision will depend on the terms of the relevant statute. A decision will generally be perfected where it is communicated to the affected person, either orally or in writing, and in a manner that indicates that the decision is not merely provisional.[8] Until then the decision maker will be able to change their mind.

Can the Decision be Treated as Invalid?

What if the decision is invalid? Can the decision maker just ignore it and make it again? Of course where there is judicial review, or some form of administrative review, the decision maker is subject to the jurisdiction of the review court or other body; if the court or other body sets aside the decision and orders the decision maker to make it again, the decision maker must do so. The difficult legal issue is whether a decision maker can simply treat a decision as invalid and make it again without direction from a review court or other body. The recent decision of the High Court in *Bhardwaj* is directly relevant to this issue.

In *Bhardwaj* Kirby J noted that the debate about invalidity of administrative decisions 'presents one of the most vexing puzzles of public law. Principle seems to pull one way. Practicalities seem to pull in the opposite direction'.[9] This is because there are two conflicting views of invalidity.

The absolute or objective invalidity approach is that if a decision maker acts outside their jurisdiction, the decision is invalid from that time and for all purposes. Importantly there is no need to have a court determine this issue.[10]

The alternative relative or subjective invalidity approach is that there is no such thing as absolute invalidity; decisions are only invalid if a court determines that they are invalid.[11] The relative view of invalidity appears more suited to a system of administrative law where judicial remedies are discretionary,[12] and the reforms of the *Administrative Decisions (Judicial Review) Act 1977*.[13]

But while most judges and commentators begin with one view, they are often forced to move towards a middle position. There is a need to balance the insights of one position, with those of the other; to balance the presumption of validity with the underlying legality of the decision; to accommodate the fact that all decisions have effect for some purposes, but that some decisions are blatantly beyond power.

This debate is relevant to whether a decision maker who has made a legal error can simply ignore the decision and make it again, or whether they need to await a judicial determination of invalidity before they can act. The decision in *Bhardwaj* dealt with this issue.

BHARDWAJ Mr Rajiv Bhardwaj's student visa was cancelled by a delegate of the Minister for Immigration and Multicultural Affairs under the *Migration Act 1958*. He applied for review of that decision by the Immigration Review Tribunal. The Tribunal invited him to attend a hearing on 15 September 1998. Late on 14 September 1998 the Tribunal received a letter from Mr Bhardwaj's agent requesting an adjournment of the hearing on the ground that he was ill. That letter did not come to the attention of the member of the Tribunal to whom the review had been assigned, and on 16 September 1998 the Tribunal affirmed the cancellation decision (the September decision).

The Tribunal communicated its decision to Mr Bhardwaj and his agent the next day. His agent drew the attention of the Tribunal to the letter requesting an adjournment, after which a new hearing was arranged, at which Mr Bhardwaj presented evidence. On 22 October 1998 the Tribunal revoked the cancellation decision and published a new decision (the October decision).

The Minister applied to have the October decision set aside by the Federal Court under Part 8 of the Migration Act on the basis that the Tribunal had no power to review the cancellation decision after making the September decision. That application was dismissed by a single judge [14] and by a majority of the Full Court of the Federal Court on appeal. [15] The matter came before the High Court after the Minister was granted special leave to appeal.

The key issue was whether the Tribunal was able to reconsider Mr Bhardwaj's review application and make the October decision, in particular in light of the statutory scheme in the Migration Act.

Majority reasoning

By a 6–1 majority (Kirby J dissenting), the High Court dismissed the Minister's appeal. [16] The majority judges all held that the Migration Act permitted the action taken by the Tribunal in making the October decision. All the majority judges held that the Tribunal had failed to discharge its statutory function in making the September decision, such that the Tribunal's review function remained unperformed. The Court held that nothing in the Migration Act or the principles of administrative law required that a purported decision involving such an error should be treated as valid unless and until set aside by a court. Therefore it was open to the Tribunal to reconsider the matter and make the October decision.

The finding of the majority of the High Court apparently places it well within the absolute invalidity school. The Court held that it was open to the Tribunal to treat the September decision as invalid and to remake it properly. Gaudron and Gummow JJ stated at [51]:

> There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all. Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged.

The difficulty in the decision lies in establishing the preconditions for such action by decision makers. On one view the Court was simply responding to the blatant error of the Tribunal in failing to provide procedural fairness in relation to its September decision. However, the general utility of the case rests on identifying broader principles, and in particular the necessary preconditions for the ability to ignore an administrative decision. An analysis of these preconditions goes some way to whittling away the apparent strong support for the absolute invalidity position.

Nature of the error

The Tribunal's error was characterised differently by the members of the Court. Gleeson CJ saw it not just as a denial of procedural fairness, that is, a jurisdictional error, but as a failure to conduct a review of the decision. [17] Callinan J held that the September decision was bad in a 'jurisdictional sense'; it was something more than a breach of the rules of natural justice, it was a failure to exercise a jurisdiction which the Tribunal was bound to exercise. [18]

The remaining four majority Justices characterised the Tribunal's error as a jurisdictional error, or at least regarded a jurisdictional error as sufficient to enable a decision maker to ignore the decision. [19]

This approach builds on the distinction between jurisdictional error, which involves an administrative body acting in excess of its powers, and non-jurisdictional error, where the body has acted within power but has made an error of law. This is a distinction which has been articulated and emphasised by the High Court, most notably in *Craig v South Australia.* [20] An administrative decision maker will make a jurisdictional error where they act in bad faith or beyond power, fail to accord natural justice, misconstrue the statute or a jurisdictional fact, fail to take into account a relevant matter or rely on an extraneous consideration. [21] This encompasses most legal errors made by administrative decision makers, and therefore leaves few non-jurisdictional errors of law. Significantly, the constitutional writs in s.75(v) of the Constitution are available to remedy jurisdictional errors by Commonwealth decision makers.

The result, in this context, of a broad view of jurisdictional error is to open the door for decision makers to ignore their decisions and make them again on the basis of a range of legal errors.

Privative clause

Whether there is jurisdictional error will depend on the nature of the decision made, and in particular whether it is subject to any privative clause. On one view, a privative clause may expand the jurisdiction of the decision maker, and therefore contract the bases of jurisdictional error. In contracting the bases for jurisdictional error, a privative clause may also contract the bases for ignoring a decision as invalid. However, the High Court has recently rejected such a view, at least in part and in relation to the privative clause in s.474 of the Migration Act. [22] Nonetheless it must be the case that the existence of jurisdictional error in a particular circumstance will depend on the form of the legislation under which the decision has been made.

Judicial review

Availability of judicial review

Further, the majority in *Bhardwaj* seems to suggest that the fact that judicial review of the September decision was available in the High Court was a relevant factor in allowing the Tribunal to treat that decision as invalid. The existence, for example, of a limitation period which has expired, would therefore be relevant to whether judicial review was available, and may be relevant to whether a decision can be ignored as invalid. [23]

Availability of successful judicial review

Further, some comments suggest that what is required is not only that judicial review for the error be available, but also an assessment that that review will be successful and will result in the decision being held invalid. Hayne J noted that the matter proceeded on an assumption that 'if application had been made either to the Federal Court…or to this Court for a writ of prohibition…[Mr Bhardwaj] would have been entitled to have the September decision set aside, or further proceedings on it prohibited'. [24]

On this reasoning, factors which would lead a court to exercise its discretion not to grant a remedy will also be relevant in deciding whether an administrator can treat a decision as invalid and ignore it. [25]

If this is so, whilst some members of the Court have affirmed the absolute theory of invalidity, the Court has in effect adopted a middle position. The Court has affirmed a decision maker's right to treat a decision infected by jurisdictional error as invalid and ignore it, but in doing so has suggested that the

availability of successful judicial review is a precondition for the decision maker doing so. In practice such a precondition will require a court decision, or a blatant error, or perhaps the agreement of the parties.

Agreement of the parties

This is one important factor which the majority Justices do not directly comment on. The Tribunal, at least impliedly, thought that the September decision was invalid. Mr Bhardwaj also, at least impliedly, thought the decision was invalid. There is a line of thought that where the relevant parties agree that a decision is invalid they can treat it as such.[26] This thinking was expounded in particular in the decision of the Full Court of the Federal Court in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd.*[27] It is a line of thought which resonates with the practical issues which arise in relation to variation or revocation of administrative decisions.

On one view the decision in *Bhardwaj* may therefore stand for the unarticulated proposition that if the parties to a decision agree that a court would set aside the decision as invalid, then they can treat it as invalid and ignore it.

Functus officio and presumption of validity

The Court generally rejected any blanket principle that once a power to make an administrative decision had been purportedly exercised, it was necessarily spent;[28] that is, it rejected any general principle of *functus officio* for administrative decisions analogous to that for courts. The majority judgments relied to a significant extent in this area on the decision of the Canadian Supreme Court in *Chandler v Alberta Association of Architects.*[29] The judgment in *Bhardwaj* also suggests that any presumption of validity in relation to administrative decisions is much weaker than in relation to judicial decisions.[30]

Effect of the Migration Act

The argument of the Minister was based in particular on the restricted regime for judicial review under the Migration Act. There was no provision of the Act which expressly purported to give any legal effect to decisions of the Tribunal that involved jurisdictional error. But it was argued that the provisions which limited the grounds upon which the Federal Court may set aside a Tribunal decision,[31] which required that applications for judicial review be made within 28 days,[32] and which expressly provided that the Federal Court had no jurisdiction with respect to judicially reviewable decisions other than that conferred by Part 8,[33] had that effect. The argument of the Minister was that as the Federal Court could not have held the September decision invalid, because of these provisions, the Tribunal could not do so.

Gaudron and Gummow JJ held that in effect these restrictions on the Federal Court did not require that Court to find that the September decision, infected by a jurisdictional error, was valid, and stated at [59]:

> As the result of the decision in *Abebe v Commonwealth*, the Parliament may limit the body of law to which the Federal Court may have regard when reviewing a decision under Pt 8 of the Act. However, it does not follow that the Parliament may require it to act on the basis that the law to be applied is contrary to that which would be applied in this Court if an application were made for prohibition or mandamus under s 75(v) of the Constitution.

The restrictive provisions in the Migration Act did not have the effect of requiring the Federal Court to treat an invalid decision as valid. This outcome undercut the argument that the Tribunal itself was so limited.

The judgments suggest that the Migration Act could have removed the ability of the Tribunal to remake

its invalid decision, and that other legislation could also do this.[34] Gaudron and Gummow JJ though suggest that a legislative provision should not be construed so as to give an administrative decision greater effect than it would otherwise have unless that implication is strictly necessary.[35]

A prudent course

Notwithstanding the legal position, Hayne J made some comments about the prudence of administrators acting without a judicial determination of invalidity at [150]:

> The question that now arises is *not* one concerning good administrative practice. It is not the province of the courts to say whether particular administrative practices are prudent or efficient and yet there would be little dispute that characteristics of prudence and efficiency are relevant to good administrative practice. It is, therefore, not to the point to ask whether the Tribunal was *wise* to make its October decision without first having the comfort and certainty of a court order holding the September decision to have been not a lawful performance of the Tribunal's duties any more than it is to the point to ask about the efficiency of adopting the course that was followed in this matter.

It is clearly the case that it would be prudent for decision makers to await a court decision about invalidity, especially where there is doubt.

Is there an Express Statutory Power to Vary or Revoke?

In *Bhardwaj*, Gaudron and Gummow JJ (with whom McHugh J generally agreed), and Hayne J, all decided that there was no need to rely upon s.33(1) of the Acts Interpretation Act to support the Tribunal's action because, prior to the October decision, there had been no relevant exercise of power by the Tribunal. But where there has been an exercise of power, it is necessary to go on and address the question of whether a decision maker can vary or revoke a decision.

In many statutes, decision makers are given an express power to vary or revoke a decision.[36] Such powers can be exercisable on the motion of the decision maker, on that of the person affected by the decision, or by both parties.[37]

A decision taken on the basis of such provisions will, like any administrative decision made pursuant to an enactment, generally be subject to judicial review. General principles of administrative law, such as the need to accord procedural fairness, to exercise a discretion for a proper purpose, and to take into account all and only relevant considerations, will apply.

Where an express statutory power is given to vary or revoke an administrative decision of a particular kind and on certain grounds, it is likely to be interpreted as excluding by implication the power to vary or revoke on other grounds, and also to exclude variation or revocation of other related decisions taken pursuant to the statute.[38]

Is there a General Power?

ACTS INTERPRETATION ACT SECTION 33(3)

Even without an express, specific power to vary or revoke, such a power may exist by operation of general legislation. In the Commonwealth sphere, the most relevant general provision is s.33(3) of the *Acts Interpretation Act*. This section provides:

> Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Whether s.33(3) extends to giving the makers of administrative instruments the power to revoke or vary a decision has been the subject of some controversy.

In *Australian Capital Equity Pty Ltd v Beale*, [39] Lee J of the Federal Court held that s.33(3) is limited to powers concerning instruments of a 'legislative character' and did not apply to instruments of an 'administrative character'. Lee J's conclusion was based on the view that the sole and obvious purpose of the Acts Interpretation Act is to deal with legislative instruments, and that having regard to the provision's history it is possible to conclude that the parenthetic expression '(including rules, regulations or by-laws)' was intended to be an exhaustive provision. This view has been accepted in *Director of Public Prosecutions Reference No.2 of 1996*, [40] *Minister for Immigration and Multicultural Affairs v Sharma*, [41] *Dutton v Republic of South Africa*, [42] and *Schanka v Employment National (Administration) Pty Ltd*. [43]

However, the reasoning of Lee J in *Beale* [44] has a number of unsatisfactory elements. In our view the conclusion is not supported by a full consideration of the relevant issues of statutory interpretation. It was always inconsistent with the decision of Brennan J, sitting as the Administrative Appeals Tribunal, in *Re Brian Lawlor Automotive Pty Ltd v The Collector of Customs, New South Wales* [45] and the decision of the Full Court of the Federal Court in *Barton v Croner Trading Pty Ltd.* [46] It has most recently been seriously questioned, and not followed, as a result of careful analysis by Emmett J in *Heslehurst v New Zealand* [47] and by the Court of Appeal of the Supreme Court of Victoria in *R v Ng.* [48] It is not necessary in light of these recent decisions to canvass in detail all the factors in support of the view that s.33(3) applies to administrative instruments. However, it is noted that the phrase '**including** rules regulations and by-laws' (emphasis added) clearly suggests that the power is not limited to rules, regulations and by-laws, a view supported by the legislative history. The term 'instrument' itself, and the phrase 'make, grant or issue', suggests that the section extends beyond legislative instruments. And whilst it is true that the Acts Interpretation Act is concerned with interpreting Commonwealth legislation, that legislation regularly gives powers to make administrative as well as legislative instruments.

The better view is that s.33(3) provides a general statutory presumption in favour of a power to revoke or vary administrative instruments.

ACTS INTERPRETATION ACT SECTION 33(1)

Section 33(1) provides that:

> Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

A restrictive view of s.33(1) is that its sole role is to clarify that a general power to do something, such as grant a social security benefit or citizenship, can be exercised each time an application is made, rather than only once. [49]

However, a broader view has been taken of s.33(1) in *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* [50] and by the Federal Court in *Bhardwa*j. [51] In *Kurtovic* it was held that the revocation of a criminal deportation order, made pursuant to a recommendation of the Administrative Appeals Tribunal, did not prevent the Minister from making a second deportation order in respect of the same criminal offence. Gummow J held that s.33(1) gave administrative decision makers the power to reconsider, revoke or remake a decision, unless the statute, upon a proper construction, indicated that the power was not to be exercised from time to time, but was spent by its first exercise. [52] In the recent case of *Pfeiffer v Stevens* [53] a majority of the High Court used the Queensland equivalent of s.33(1) to allow a

Minister to exercise a power to extend the operation of a law more than once.

The primary practical issue in relation to both s.33(3) and s.33(1) of the Acts Interpretation Act is whether there is a contrary intention in the relevant statute. We consider this issue further below.

Is there an Implied Power?

It is also necessary to consider whether, apart from s.33(3) and s.33(1) of the Acts Interpretation Act, a power to vary or revoke may be found by implication. Some of the recent judicial considerations have looked at the issue of whether there is an implied power without the lens provided by the Acts Interpretation Act provisions.[54] It seems more appropriate to begin with these general statutory powers. But the question of whether there is contrary intention for the purposes of these powers, and the question of whether there is an implied power, give rise to much the same issues.

In deciding whether there is an implied power to vary or revoke, and in determining whether there is a contrary intention for the purposes of s.33 of the Acts Interpretation Act, the Courts have looked at common factors. In doing so, they have been concerned to balance the conflicting policy considerations identified by French J in *Sloane v Minister for Immigration, Local Government and Ethnic Affairs:*[55]

> The implication into an express grant of statutory power of a power to reconsider its exercise would be capable, if not subject to limitation, of generating endless requests for reconsideration on new material or changed circumstances. …
>
> Against the difficulties that may arise from the implication of a power to reconsider a decision there is the convenience and flexibility of a process by which a primary decision-maker may be persuaded on appropriate and cogent material that a decision taken ought to be re-opened without the necessity of invoking the full panoply of judicial or express statutory review procedures.

RELEVANT FACTORS FOR A CONTRARY INTENTION AND IMPLIED POWER

Slips

One situation in which the courts have uncontroversially found a power to vary is where a decision maker wishes to correct a clerical error that does not change the form or substance of their decision.

Clear statutory intention

Some statutes provide a clear indication that the power granted, once exercised, is spent. In some few cases, the legislation makes clear that there is no power to vary or revoke. Section 26 of the *Administrative Appeals Tribunal Act 1975* is such a provision.

Where a statute provides that certain decisions are ‘final’ or ‘final and conclusive’, this evidences an intention contrary to the existence of a power to revoke or vary.[56]

Nature of the function

An important factor is the nature of the function exercised, which may either indicate that the power is continuing or that it is to be used only once.[57] The effect on third parties will be an important aspect of the nature of the power, and the effect of variation or revocation on them an important aspect of this factor. For example, where decisions involve granting a licence, funds or employment to one individual over others, the fact that allowing the decision maker to reconsider the decision at the request of an unsuccessful party could have a negative impact on the innocent successful party is an indication that the power, once exercised, should not be varied or revoked.

Consequences

A related factor is the consequence of a power of amendment or revocation, or lack of power, in light of the statutory scheme.[58]

Procedure

Another factor is the procedure for, and manner of, making the decision. In *Bhardwaj*, Kirby J held, in his dissenting judgment, that on its proper construction the Migration Act procedures evinced a contrary intention for the purposes of s.33(1) of the Acts Interpretation Act.[59] The fact that a majority of the High Court found in *Bhardwaj* that the Tribunal was able to ignore its September decision and make its October decision does not affect the relevance of these comments in relation to whether there is a general power to vary or revoke.

Merits review

Another factor, which the courts have recognised as indicating a statutory intention contrary to the existence of a power to vary or revoke, is the availability of merits review, be this internal or through an administrative appeals tribunal.[60] Generally, a clear and well structured scheme of review tells against any general power of reconsideration.

Opportunity to reapply

A related factor is the existence of an opportunity to make a further primary application where some benefit has been denied.[61] Generally, an ability to make a new application tells against any general power of reconsideration.

Nature of any error

The nature of any error made by the decision maker, a possible further factor, is likely to be less relevant after the High Court's decision in *Bhardwaj*, and the finding there that a jurisdictional error generally results in an invalid decision, which can be ignored and made again without the need for a power to revoke.

Time

Another factor is that any variation or revocation needs to be timely. There is unlikely to be found an implied power to vary or revoke at any time after a decision has been made. There may be other similar factual considerations which in particular circumstances tell against a power.

Agreement

A further issue in this context is whether the fact that the decision maker and the party or parties affected agree to the variation or revocation is relevant. As a matter of practicality, this will clearly be relevant, since if there is agreement, there is unlikely to be a legal challenge. Where the decision maker wishes to make a new decision more favourable to the applicant, this will often be with their explicit or implicit agreement, and again a legal challenge is unlikely. However, it is sometimes difficult to find a principled basis for this approach.

We have noted that in *Bhardwaj* there was agreement between Mr Bhardwaj and the Tribunal as to the course to be taken, and impliedly that the September decision was invalid and therefore able to be ignored. The Court confirmed the correctness of their 'agreed' position, though it did not explicitly draw any relevance from their agreement.

In *Comptroller-General of Customs v Kawasaki Motors Pty Ltd*,[62] a case involving the decision of the Comptroller-General to revoke a previous revocation of a Commercial Tariff Concession order with the consent of the affected party, Hill and Heerey JJ held that:

> It would in our opinion be strange if an administrative order remained valid until set aside by an order of a court even though the decision-maker did not seek to uphold the order. Courts have long recognised the rule of policy that there is a public interest in the avoidance of litigation and the termination of litigation by agreement when it has commenced. The argument that disputed orders

could not be treated, by agreement of all concerned, as void would directly conflict with that rule. Parties would be forced into pointless and wasteful litigation.

There are significant further questions as to whether an agreement that a decision is tainted by non-jurisdictional error, or an agreement to vary or revoke a decision without any error, is enough to support a power to vary or revoke.

Conclusion

We have looked in this Briefing at the five questions which Commonwealth administrative decision makers should ask if they wish to revoke or vary a decision.

- First, is the decision perfected? If it is not the decision can be reconsidered; no power to vary or revoke will be necessary.
- Second, is the decision invalid and able to be ignored? On the basis of *Bhardwaj*, in order for a decision maker to treat a decision as invalid requires at least a jurisdictional error. It also probably requires that judicial review is available, and that it is clear that a court would hold the decision invalid in judicial review proceedings. A prudent course in cases of doubt would be to await a judicial determination. Agreement by the person affected to treating the decision as invalid limits the legal risk in doing so.
- Third, if there is a decision which cannot be ignored, is there an express statutory power to vary or revoke? Any exercise of such a power will need to be in accordance with general administrative law principles.
- Fourth, do the general powers in ss.33(1) or 33(3) of the Acts Interpretation Act allow for variation or revocation? The better view is that s.33(3) applies to administrative as well as legislative instruments. But both provisions are subject to a contrary intention in the relevant legislation.
- Fifth, is there an implied power to vary or revoke? We have noted a range of relevant factors in determining whether there is a contrary intention for the purposes of ss.33(1) or (3) of the Acts Interpretation Act, or whether a power to vary or revoke can otherwise be implied.

NOTES

1 This briefing is based on research conducted by Robyn Briese while an intern (from the Faculty of Law at the Australian National University) with the Australian Government Solicitor, under the supervision of Robert Orr QC, Deputy General Counsel.

2 [2002] HCA 11 (14 March 2002); (2002) 209 CLR 597; 187 ALR 117. The decision in *Pfeiffer v Stevens* [2001] HCA 71 (13 December 2001); (2001) 209 CLR 57; 185 ALR 183 is also indirectly relevant to this issue.

3 *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 92 ALR 93; *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429; *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 76 FCR 301, 145 ALR 532; *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400, 150 ALR 76; *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533; *Heslehurst v New Zealand* (2002) 117 FCR 104, 189 ALR 99

4 E Campbell, 'Revocation and Variation of Administrative Decisions' (1996) 22(1) *Mon LR* 30; E Campbell 'Effect of Administrative Decisions Procured by Fraud or Misrepresentation' (1998) 5 *AJ Admin L* 240; R Beech-Jones 'Reopening Tribunal Decisions: Recent Developments' (2001) 29 *AIAL Forum* 19; M Allars 'Perfected Judgments and Inherently Angelical Administrative Decisions: The Powers of Courts and Administrators to Re-open or Reconsider Their Decisions' (2001) 30 *AIAL Forum* 1; R Orr and R Briese 'Don't Think Twice; Can Administrative Decision Makers Change Their Minds?' (2002) 35 *AIAL Forum* 11. See also E H Shopler, 'Power of administrative agencies to reopen and reconsider final decisions as affected by lack of specific statutory authority' 73 *American Law Reports Annotated 2d* 939; R A MacDonald, 'Reopenings, Rehearings and Reconsiderations in Administrative Law: *Re Lornex Mining Corporation and Bukwa*' (1979) 17(1) *Osgoode Hall LJ* 207.

5 [2002] HCA 11 at [8]

6 *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93, Gummow J at 112;

Sloane v Minister for Immigration, Local Government and Ethnic Affairs (1992) 37 FCR 429, French J at 443; *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532, Goldberg J at 542.

7 E Campbell, 'Revocation and Variation of Administrative Decisions' (1996) 22(1) *Mon LR* 30 at 38–40

8 *Semunigus v Minister for Immigration and Multicultural Affairs* [1999] FCA 422; *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533

9 [2002] HCA 11 at [101]

10 *Posner v Collector for Interstate Destitute Persons (Vict.)* (1946) 74 CLR 461; *Ousley v The Queen* (1997) 192 CLR 69, McHugh J at 100; *Leung v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 76 Finkelstein J at 88. It is in the area of fraud and misrepresentation that courts appear most willing to declare that a decision so procured can simply be treated as invalid and ignored.

11 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, Aickin J at 277; see also *Smith v East Elloe Rural District Council* [1956] AC 736; *F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295; *Wattmaster Alco Pty Ltd v Button* (1987) 70 ALR 330; *R v Balfour; ex parte Parkes Rural Distributions Pty Ltd* (1987) 17 FCR 26, Wilcox J at 33; *Ousley v The Queen* (1997) 192 CLR 69, Gummow J at 130–131.

12 *Administrative Decisions (Judicial Review) Act 1977* s.16; HWR Wade, 'Unlawful Administrative Action: Void or Voidable?' (1967) 83 *LQR* 526 and (1968) 84 *LQR* 95; M Taggart 'Rival Theories of Invalidity in Administrative Law: Some Practical and Theoretical Consequences' in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s*, 1987 at page 70; A Robertson 'Administrative Law Remedies: Some discretionary considerations' (2002) 22(2) *Australian Bar Review* 119

13 Section 16 sets out the orders which a court may make. This includes:

> (a) an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the court specifies; … .

When a court sets aside a decision, the default position is that it is from the time of the order of the court, not from the time the decision was made. This suggests relative invalidity, not absolute invalidity. Further, the section provides for a range of non-invalidating remedies. In addition, s.10 provides the court with a discretion to refuse an application if adequate provision is made for review by another court, tribunal authority or person.

14 *Minister for Immigration and Multicultural Affairs v Bhardwaj* [1999] FCA 1806 (22 December 1999, Madgwick J), on the basis that the September decision had not been lawful and was therefore open to collateral challenge in the Federal Court.

15 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2000) 99 FCR 251 (Beaumont and Carr JJ, Lehane J dissenting), on the basis that the Tribunal had the power to make the October decision because of s.33(1) of the Acts Interpretation Act.

16 [2002] HCA 11 (14 March 2002); (2002) 209 CLR 597; 187 ALR 117

17 [2002] HCA 11 at [14]

18 [2002] HCA 11 at [162]–[165]

19 [2002] HCA 11 Gaudron and Gummow JJ at [44]; Hayne J at [149]. McHugh J generally agreed with Gaudron and Gummow JJ.

20 (1995) 184 CLR 163

21 *Craig v South Australia* (1995) 184 CLR 163 at 177

22 *Plaintiff S157 of 2002 v The Commonwealth* [2003] HCA 2, 4 February 2003; (2003) 192 ALR 24

23 There is a question as to whether any requirement for judicial review to be available could be met by the availability of collateral challenge.

24 [2002] HCA 11 at [147]; see also [152], [155] and [157]. Gleeson CJ at [13] specifically noted that the High Court had recently decided in *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 that failure to accord procedural fairness resulted in an excess of jurisdiction sufficient to attract prohibition, but that the remedy was discretionary. Whilst not pursuing this thought, the comment indicates a concern that discretionary considerations may be a brake on moving too far towards an absolute view of invalidity. The illogicality referred to by Gaudron and Gummow JJ at [51], quoted above, arises in the situation 'until the decision is set aside', suggesting that what is required before a decision maker can treat a decision as invalid is not only the availability of judicial review, but an assessment that a court will set aside the decision.

25 See also the comments at [2002] HCA 11 at [13] by Gleeson CJ in relation to time, and [2002] HCA 11 at [143] by Hayne J in relation to the effect on third parties, both factors traditionally relevant to the exercise of judicial discretion to grant a remedy.

26 M Akehurst, 'Revocation of Administrative Decisions' (1982) *PL* 613 at 616–617; E Campbell, 'Revocation and Variation of Administrative Decisions' (1996) 22(1) *Mon LR* 30 at 53.

27 (1991) 32 FCR 219 at 229–230, 103 ALR 661 at 671

28 [2002] HCA 11, Gleeson CJ at [5]

[29] [1989] 2 SCR 848

[30] [2002] HCA 11, Hayne J at [151]

[31] Section 476

[32] Section 478(1)

[33] Section 485(1) and (3)

[34] [2002] HCA 11, Gleeson CJ at [8]; Gaudron and Gummow JJ at [44], [54]

[35] [2002] HCA 11 at [48]

[36] See E Campbell, 'Revocation and Variation of Administrative Decisions' (1996) 22(1) *Mon LR* 30 at 57–63 for a detailed description of the reasons for conferring these powers and the consequences of doing so.

[37] See for example the *Veterans' Entitlements Act 1986* s.31 and s.118ZP; the *Safety, Rehabilitation and Compensation Act 1988* s.62.

[38] *Pearce v City of Coburg* [1973] VR 583 at 587–588; *Leung v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 76, Heerey J at 79

[39] (1993) 41 FCR 242; 114 ALR 50

[40] (1997) 141 FLR 414

[41] (1999) 90 FCR 513, 161 ALR 53

[42] (1999) 162 ALR 625

[43] (2001) 110 IR 97

[44] (1993) 114 ALR 50 at 59–63

[45] (1978) 1 ALD 167

[46] (1984) 3 FCR 95; 54 ALR 541

[47] (2002) 189 ALR 99

[48] [2002] VSCA 108 (2 August 2002); (2002) 5 VR 257

[49] *Dutton v Republic of South Africa* (1999) 162 ALR 625 at 636

[50] (1990) 92 ALR 93

[51] (2000) 99 FCR 251

[52] (1990) 92 ALR 93 at 112 and 119–120

[53] [2001] HCA 71 (13 December 2001); (2002) 185 ALR 183

[54] *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532 at 541; *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429; *Leung v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 76, Heerey J at 77–79

[55] (1992) 37 FCR 429 at 443

[56] E Campbell, 'Revocation and Variation of Administrative Decisions' (1996) 22(1) *Mon LR* 30 at 56–57; *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532 at 547 in relation to a reference to 'finally determined'.

[57] In *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93, where Neaves and Gummow JJ held that the power to make a deportation order once the conditions for such an order were satisfied was of a continuing nature.

[58] *Edenmead v Commonwealth* (1984) 59 ALR 359 at 365*; Heslehurst v New Zealand* (2002) 189 ALR 99 at 107

[59] See also *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2000) 99 FCR 251, Lehane J at 265.

[60] *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429; *Re Cotterell and Repatriation Commission* [2000] AATA 444; (2000) 31 AAR 184

[61] *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532 at 547

[62] (1991) 103 ALR 661 at 671

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